

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 October 2006

CASE NUMBER: 2005-LHC-02193

OWCP NUMBER: 14-137417

In the Matter of:

D. R.,
Claimant,

v.

SEA-LAND SERVICES, INC, a.k.a. CSX LINES,
Employer,

and

KEMPER INSURANCE COMPANIES,
Insurer.

Appearances:

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For the Claimant

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For the Defendants

Before: Paul A. Mapes
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises from a claim under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (the "Act" or the "Longshore Act"). The claimant seeks Longshore Act benefits for an injury that occurred while he was working for CSX Lines ("the employer" or "CSX Lines") on February 24, 2002. A trial on the merits of the claim was held on January 11 and 12, 2006 in Seattle, Washington. All parties were represented by counsel and the following exhibits were admitted into evidence: Claimant Exhibits ("CX") 1- 30 and Employer Exhibits ("EX") 1-22, and 24-41. All parties filed post-trial briefs.

BACKGROUND

The claimant was born on May 28, 1953. Tr. at 70. He has a high school equivalency degree and has completed various college courses. EX 1 at 40, EX 15 at 51, Tr. at 71, 325, 368. In 1984, he moved to Dutch Harbor, Alaska, and in 1988 he began working as a longshoreman. Tr. at 72-74, EX 1 at 40-43. In 1994, the claimant was hired to be a “gatehouse dispatcher” at a marine terminal operated by Sea-Land Services, the corporate predecessor of CSX Lines.¹ EX 39 at 583, Tr. at 83. According to the claimant’s testimony, the hours he worked as a gatehouse dispatcher varied and when things would “slow down” he would get other kinds of longshore jobs from his union’s hiring hall. Tr. at 101-02, EX 15 at 25. However, during busy periods, he would sometimes work as a gatehouse dispatcher for as many as 80 to 100 hours a week. Tr. at 101-02. The claimant also routinely took off 12 to 13 weeks each year, as permitted by the employer. Tr. at 103.

Around September 2001, the claimant developed right shoulder pain after pruning trees on farm property that he owns in Maine. Tr. at 106-07. After the pain had continued for about a month, the claimant sought medical attention from Laurence Wickler, D.O., who practices orthopedic surgery in Anchorage. Tr. at 106-07, CX 4. On September 27, 2001, Dr. Wickler examined the claimant and determined that there were signs of an anterior impingement and a possible rotator cuff tear. EX 18. Dr. Wickler also noted that x-rays showed calcification in the claimant’s coracoacromial ligament. EX 18 at 341.

On October 5, 2001, the claimant underwent an MRI of his right shoulder that was interpreted by Dr. Lawrence P. Wood as showing a focal tear in the claimant’s supraspinatus tendon and “[m]oderately severe acromioclavicular osteoarthritis with hypertrophic changes” that put the claimant at “a high risk for impingement.” CX 3 at 27. After receiving Dr. Woods’ report, Dr. Wickler recommended surgical treatment and explained to the claimant that after he recovered from the surgery, he should have a “functional range of motion” in his shoulder but would not achieve a complete return of motion. EX 19 at 353-54. As recommended by Dr. Wickler, the claimant underwent arthroscopic surgery on October 31, 2001. CX 3 at 29-33. During the surgery, Dr. Wickler repaired the claimant’s rotator cuff and a superior labral anterior posterior (“SLAP”) lesion. Tr. at 108-09, CX 3 at 29-33.

On November 14, 2001, Dr. Wickler’s measurements of the claimant’s right shoulder showed passive elevation of 45 degrees, external rotation of 15 degrees, and internal rotation of 10 degrees. EX 18 at 343. Likewise, measurements taken on December 4, 2001 showed passive elevation of 45 to 50 degrees, external rotation of 10 to 15 degrees, and internal rotation of 15 degrees. EX 18 at 343. Given these measurements, on December 18, 2001, Dr. Wickler observed that the claimant’s “[i]nternal and external rotation are still quite stiff,” and that he “still lacks about 5-10 degrees of elevation.” EX 18 at 343. The claimant visited Dr. Wickler again on January 16, 2002 and February 5, 2002. CX 3 at 10. During the February 5 visit, Dr. Wickler released the claimant to return to “full duty” and noted that his right shoulder had

¹ Sometime after February of 2002, the operation of CSX Lines’ marine terminal in Dutch Harbor was taken over by Horizon Lines. Tr. at 83, 249.

achieved a passive elevation of 60 degrees, an external rotation of 15 to 20 degrees, and an internal rotation of 30 degrees. CX 3 at 10.

On February 7, 2002, the claimant returned to Dutch Harbor and resumed his job as a gatehouse dispatcher. Tr. at 109.

During the course of the claimant's work as a gatehouse dispatcher on February 24, 2002, he left the gatehouse to move a vehicle from the gatehouse parking lot and slipped on a patch of ice as he stepped from a walkway into the parking lot. Tr. at 109-10, EX 15 at 69. According to the claimant, he then fell "fast" and "very hard" onto the right side of his body. Tr. at 110-11. The claimant further testified that when he hit the ground, he heard a "loud snapping sound" and that when he got up his hip and right shoulder were sore. Tr. at 110-12. Later that same day, the claimant filed an injury report in which he identified his right hand, right hip, and right shoulder as the "body parts affected" by his fall in the parking lot. CX 19 at 206, Tr. at 112-13, 160-63. He did not, however, indicate on the form that he had any neck pain or injury to his neck. CX 19 at 206. The claimant then completed the rest of his shift and worked a full shift on the following day. Tr. at 112. On the third day, however, the claimant concluded that his symptoms were increasing and he therefore sought medical treatment at Illiliuk Family and Health Services in Unalaska, Alaska. EX 31 at 566, Tr. at 112-13, 163, 174.

At the clinic, Dr. Gary Berliner took x-rays of the claimant's right shoulder and diagnosed a first-degree right shoulder acromioclavicular joint separation with a first-degree acromioclavicular ligament sprain and chip evulsion. Tr. at 113-14, 163-64; EX 30 at 507, 525, 527-28; EX 31 at 568. Dr. Berliner also referred the claimant to Dr. Wickler for further treatment and provided him with analgesics and a clavicle strap (velpeau sling) that he used to immobilize his arm in the following weeks. EX 16 at exhibit 3, Tr. at 113, 163-64.

Because of harsh weather conditions and administrative difficulties in obtaining authorization for travel to Anchorage, the claimant was unable to see Dr. Wickler until March 12, 2002. EX 18 at 346, Tr. at 114-15, CX 3 at 10, 16. In the meantime, the claimant worked 32 hours of straight time and 80.5 hours of overtime during the first week after the incident, 40 hours of straight time and 52.5 hours of overtime in the second week, and 40 hours of straight time and 46 hours of overtime during the third week. EX 10 at 251, Tr. at 172-74.

During Dr. Wickler's March 12 examination of the claimant, he observed that there was a loss of motion and strength in the claimant's right shoulder and that the claimant "shrugs as he tries to elevate." CX 3 at 10. Dr. Wickler suspected that the claimant re-injured his shoulder and therefore requested that the claimant undergo an MRI. CX 3 at 10, Tr. at 115. Dr. Wickler's report of the March 12 examination does not contain any reference to any complaints of neck or arm pain. CX 3 at 10.

The MRI requested by Dr. Wicker was interpreted by Dr. Wood as showing "[p]ostsurgical changes to the supraspinatus tendon with no obvious tear but intermittent signal intensity at its insertion site is consistent with scarring or chronic tendinopathy." CX 3 at 25. In addition, Dr. Wood noted that there was "[f]luid within the subacromial subdeltoid bursa" but

“[n]o definite labral or capsular” abnormalities. CX 6 at 64. Dr. Wood also commented that the claimant’s “[m]oderately severe acromioclavicular osteoarthritis” was unchanged. CX 3 at 25.

On March 21, 2002, Dr. Wickler reviewed the results of the MRI and determined that there had not been a “re-tear” in the claimant’s rotator cuff repair. CX 3 at 10. However, he observed that the claimant’s continued “pain over the anterior portion of his shoulder . . . [and] the upper part of his shoulder” was “consistent with a first degree sprain of the AC joint,” which he attributed to the claimant’s fall. CX 3 at 10. Dr. Wickler also reported that the claimant had complaints of “mid and upper thoracic pain” which he added was “probably also directly related to his fall.” CX 3 at 10. In addition, Dr. Wickler concluded that the claimant was not ready to return to full-duty work and referred him to Dr. Steve Henderson, a chiropractor and physical therapist, for treatment of the thoracic and upper thoracic symptoms. CX 3 at 10. Dr. Wickler noted, however, that he would release the claimant for light duty work, if the employer was willing to employ him in a light duty position. CX 3 at 10, EX 18 at 346. Dr. Wickler also decided that the claimant should continue to receive physical therapy from Alaska Health Quest. CX 3 at 10, Tr. at 115-17.

The claimant was immediately seen by Dr. Henderson, who noted in a report dated March 21, 2002 that the claimant said that he had constant pain at level six on a ten point scale “in the left region of [his] neck and stiffness in [his] neck which is increased by bending the neck right.” CX 10 at 129. In addition, Dr. Henderson reported that the claimant complained of level-five pain in his right shoulder and that he had broken a tooth when he fell. CX 10 at 129. Although the report indicates that the claimant’s lumbosacral and cervical ranges of motion were all normal, it also indicates that a test for “cervical nerve root compression” was positive bilaterally. CX 10 at 130.

On April 19, 2002, Dr. Wickler reported that the claimant was still experiencing “pain over the AC joint and the coracoclavicular ligaments” and was not ready to return to full duty. CX 3 at 9, EX 30 at 544. Additionally, he noted that Dr. Henderson was attending to the claimant’s “upper back” and that the claimant had undergone dental work “secondary to his fall.” CX 3 at 9, EX 30 at 544.

On April 22, 2002, Dr. Henderson re-examined the claimant and found a “mild to moderate level of discomfort” upon palpating the claimant’s neck tissues at levels C1, C2, and C5. EX 30 at 545. On that same, date Dr. Henderson reported that there had been no change in the claimant’s neck pain and that his measurements of the range of motion in the claimant’s neck produced less than normal results for all ranges except flexion. EX 30 at 547.

On May 17, 2002, Dr. Wickler found that the claimant’s shoulder condition was improving and reported that the claimant had right shoulder elevation of 90 degrees, external rotation of 45 to 60 degrees, and internal rotation of 30 degrees. CX 3 at 9. He also noted that the claimant would continue to receive physical therapy twice a week and opined that the claimant was not yet able to return to work. CX 3 at 9.

On June 18, Dr. Wickler re-examined the claimant and observed that although he continued to complain of pain in his AC joint and neck, his shoulder motion was “excellent.”

CX 3 at 9. However, Dr. Wickler further noted that the claimant said that “[r]apid motion” and “jerking” were highly uncomfortable and that even trying to hit a tennis ball two or three times was unpleasant. CX 3 at 9. Dr. Wickler opined that the claimant was still not ready for full-duty work. CX 3 at 9.

On July 1, 2002, Dr. Henderson reported to Dr. Wickler that the claimant had a restricted range of motion in his cervical spine and opined that he was “still not medically stable to return to work.” EX 24 at 485. Dr. Henderson also recommended that the claimant continue with chiropractic therapy for another six weeks.” EX 24 at 485.

On July 30, 2002, Dr. Wickler observed that the claimant had “a mildly provocative test for SLAP lesion” and opined that the claimant’s “options are to continue to live with it as is” or “arthroscopically remove the end of his clavicle” and re-address the SLAP lesion, if it was re-injured when the claimant fell. CX 3 at 9. However, he added, the surgery “may or may not bring him to the point of returning to his previous level of activity.” CX 3 at 9. Dr. Wickler further noted that he believed that the claimant’s SLAP lesion and rotator cuff had healed, and that the majority of his symptoms were directly related to the AC joint. CX 3 at 9. In addition, Dr. Wickler wrote:

At his previous exam prior to his surgery, he had absolutely no symptoms in his AC joint. Since the fall, the AC joint symptoms have increased, and I think it is directly related to his injury. Even though he had some pre-existing degenerative changes, I don’t believe he would have come to treatment were it not for this most recent fall.²

CX 3 at 9.

On August 5, 2002, the claimant was examined by Dr. Holm W. Neumann, an orthopedic surgeon, at the request of the insurer’s third party claims administer, Gallagher Bassett Services (Gallagher Bassett). CX 27 at 272-79. According to Dr. Neumann’s report, the claimant indicated that his chief complaints at that time were right hip pain, neck pain, and right shoulder pain. CX 27 at 272. During his physical examination of the claimant, Dr. Neumann took detailed measurements of the ranges of motion in the claimant’s shoulders and cervical spine. CX 27 at 276-77. Based on the results of his examination, Dr. Neumann concluded that the claimant suffered from “[t]rochanteric bursitis [at the] right hip, superimposed upon an apparent spurring or some type of anomaly” and that the “bursitis and current need for treatment is basically secondary to his contusion from the fall of February 24, 2002.” CX 27 at 277. In addition, Dr. Neumann noted that the claimant had “[p]re-existing osteoarthritis in the acromioclavicular joint” of his right shoulder and degenerative disc and joint disease in his cervical spine, which Dr. Neumann characterized as “pre-existing his incident of February 24, 2002.” CX 27 at 277-

² The record does not contain any notes from any examination that Dr. Wickler may have conducted immediately prior to his October 31, 2001 surgery on the claimant’s shoulder. However, Dr. Wickler’s chart note of September 27, 2001, indicates that the physical examination he conducted on that date showed that the claimant had “moderate AC joint tenderness” and “pain at the AC joint.” EX 18 at 341. It is apparently these symptoms that Dr. Wickler was referring to when he wrote that “[s]ince the fall, the AC joint symptoms have increased.”

78. However, despite the fact that the claimant's rotator cuff tear and SLAP lesion had been diagnosed and repaired well before February of 2003, Dr. Neumann also opined that the claimant's rotator cuff tear and SLAP lesion were "secondary" to his work injury. CX 27 at 277-78. In addition, he concluded that the claimant had not reached maximum medical improvement and was unable to return to work as a longshoreman because he continued to experience "significant symptomatology in the right shoulder." CX 27 at 278. Dr. Neumann added that another month of conservative management would be appropriate for treating the claimant's shoulder symptoms and opined that if he showed "significant improvement," his injury could be declared to be permanent and stationary. Otherwise, he noted, consideration should be given to "surgical management." CX 27 at 278.

On August 14, 2002, the claimant sent a letter to a chiropractor in Maine, in which he informed the chiropractor that he would soon be visiting Maine and wished to schedule some chiropractic adjustments. EX 21 at 427-29. In the letter, the claimant also indicated that his major problem continued to be a separated AC ligament in his right shoulder that caused pain when he performed light chores and normal daily activities. EX 21 at 427. As well, the claimant wrote, he was "still experiencing considerable pain in the upper neck area on both sides during rotation, especially if my head is tilted up during rotation." EX 21 at 428 (emphasis omitted).

On September 9, 2002, Dr. Wickler found that the claimant was having less pain in his AC joint, but that he still experienced "pain over the anterior lateral aspect of the acromion right at the insertion of the supraspinatus." CX 3 at 8. Accordingly, Dr. Wickler requested that the claimant continue with physical therapy and did not release the claimant to return to full-duty work. CX 3 at 8.

On October 8, 2002, Dr. Wickler found the claimant "coming along" to the point that he could return to light duty work, but noted that returning to work on such a basis was "not an option" because the claimant would still need to receive physical therapy that was unavailable in Dutch Harbor. CX 3 at 8. Dr. Wickler also indicated that the claimant was still having difficulty with his neck. CX 3 at 8.

On October 14, 2002, the claimant again saw Dr. Henderson, who concluded that he should undergo additional imaging studies of his cervical spine. EX 21 at 433. As a result, later that same day the claimant underwent an MRI scan of his cervical spine at the Providence Imaging Center in Anchorage. The results of that scan were interpreted by Dr. Chakri Inampudi as revealing "a focal disc extrusion at C5-C6 level centrally and eccentrically to the left" that was causing "significant left lateral recess and left-sided neuroforaminal narrowing" but without having a "mass effect" on the claimant's spinal cord. CX 7 at 69. Dr. Inampudi's report also indicates that he observed a "focal disc protrusion centrally and slightly more eccentrically to the right" at level C6-C7, but did not see any evidence of spinal cord compression. CX 7 at 69. Finally, Dr. Inampudi noted that there was also a focal disc protrusion at the T1-T2 level, which he described as being located "centrally and eccentrically to the right," that caused "mild right lateral recess narrowing" but no "neuroforaminal narrowing." CX 7 at 69.

At the request of Dr. Henderson, on December 10, 2002 the claimant was examined by Dr. Louis Kralick, a board-certified neurosurgeon. CX 6 at 60-63, Tr. at 120. In his report, Dr.

Kralick indicated that he had examined the imaging studies of the claimant's cervical spine and that he believed they showed a "disc herniation and canal and root compression at the C5-6 level." CX 6 at 61. Dr. Kralick therefore recommended that the claimant undergo a discectomy and fusion at level C5-6.

Two days later, the claimant was re-examined by Dr. Wickler, who reported that the claimant was still having shoulder problems and speculated that the claimant's failure to achieve greater improvement in his shoulder might be due to the cervical disc herniations. CX 3 at 8. Accordingly, Dr. Wickler concluded that it would be best to postpone further treatments of the claimant's shoulder until after the claimant had undergone the neck surgery recommended by Dr. Kralick. CX 3 at 8.

On December 18, 2003, the claimant sent a letter to Gallagher Bassett in which he represented that Dr. Kralick, Dr. Wickler, and Dr. Henderson all "agree the injury to [his] neck was a result of the accident on February 24" and that all three of them recommended surgery to correct damage to the lower part of his neck. EX 21 at 432-34. The letter also asserted that Dr. Kralick, Dr. Wickler, and Dr. Henderson all believed that there was a relationship between the neck and shoulder injuries and that the healing progress for his right shoulder had probably been limited by the neurological problems in his neck. EX 21 at 434.

On January 21, 2003, the defendants responded to the claimant's letter by issuing a Notice of Controversion which admitted liability for an injury to the claimant's shoulder, but disputed all liability for any injury to the claimant's cervical, thoracic or lumbar spines. CX 20 at 207.

On the same day that the defendants issued the Notice of Controversion, Dr. Kralick re-examined the claimant and reported that flexion and rotation of the claimant's neck was "severely limited." CX 6 at 58. Dr. Kralick also opined that there was unlikely to be much improvement in the claimant's neck with "conservative management." CX 6 at 58.

On February 14, 2003, Dr. Henderson sent the Department of Labor a letter concerning the claimant's cervical condition. In the letter he wrote:

It is my personal opinion that [the claimant's] injury has directly caused trauma to his shoulder as well as his cervical spine. He never complained of neck problems prior to the accident of February 2001. We discovered through MRI of the C-spine that he has direct trauma to the neck. This would explain his long-term problems with stiffness, decreased range of motion to the cervical spine and now, radiculopathy into the right upper extremity. It is not uncommon to see injury of this nature from this type of fall. We know that there was trauma to the head and neck, if there was enough force to cause a broken tooth to occur. This type of injury is similar to whiplash of the cervical spine, causing trauma to the intervertebral disk.

CX 10 at 92. Dr. Henderson concluded by reiterating, “Again it is my professional opinion that this injury to his disks are related to the fall. CX 10 at 92.

Similarly, on March 10, 2003, Dr. Kralick wrote, “In my opinion [the claimant’s] neck and shoulder conditions were related to an accident that occurred on or about February 24, 2002. This, in my opinion, resulted in symptomatic disc herniation with neck and continued arm pain complaints.” CX 6 at 57.

On March 11, 2003, Dr. Wickler re-examined the claimant and observed that although the claimant continued to experience pain in his shoulder, his shoulder range of motion was “actually quite good.” CX 3 at 7. However, Dr. Wickler also opined that the claimant “has a central disc [herniation] which may also be affecting strength to the right upper extremity.” CX 3 at 7.

On that same day, Dr. Wickler dictated a letter to Gallagher Bassett concerning the claimant’s condition and, according to a notice stamped on the letter, it was sent to Gallagher Bassett without first being proofread by Dr. Wickler. EX 21 at 453. In the letter, Dr. Wickler noted that the claimant had a “surgical lesion of his cervical spine” and commented that given the claimant’s history, “one would have to assume cause and effect from his fall on or about 2/24/02.” EX 21 at 453. On March 19, 2003, the claimant called Dr. Wickler’s office and left a message indicating that the letter erroneously said that he had “no significant” shoulder pain in the week after his work injury and asked that the statement be corrected. EX 21 at 455. Thereafter, Dr. Wickler proofread the letter and made the correction requested by the claimant. EX 21 at 453, 454.

On April 4, 2003, the claimant sought a second opinion concerning the treatment of his cervical condition from Dr. Frederick T. Waller, a board-certified neurosurgeon located in Portland, Oregon. CX 29 at 281-83, Tr. at 121, 123. In his report, Dr. Waller observed that x-rays and a cervical MRI revealed degenerative disc changes “at C5-6 and C5-7 with evidence of bilateral foraminal narrowing at C5-6” and noted that the claimant had reported “tingling paresthesia and numbness” in his right arm that occasionally also appeared in his left arm. CX 29 at 281-82. Dr. Waller opined that if the claimant developed left C6 radiculopathy, a discectomy and interbody fusion would be advisable, but that in the absence of such radicular left arm symptoms, there was only “a 50/50” chance that the claimant would benefit from such surgery. CX 29 at 283.

On April 12, 2003, the claimant was examined at the request of Gallagher Bassett by Dr. Anthony Woodward, a board-certified orthopedic surgeon. EX 2 at 44, EX 3 at 58. During the examination, the claimant complained of pain in his left cervical paraspinal muscles that was triggered when he rotated or extended his neck, aching pain in the back of his neck, intermittent pain in his right acromioclavicular joint, and pain over his right greater trochanter. EX 2 at 52. Furthermore, the claimant indicated that he experienced tenderness over “the superior aspect of the greater tuberosity” of his right shoulder and around “the 5th cervical vertebra in the midline.” EX 2 at 54. Dr. Woodward also noted that the claimant’s chiropractor had previously observed that the claimant experienced shooting pain in his left cervical paraspinal muscles when rotating and extending his head. EX 2 at 46.

When Dr. Woodward conducted a neurological motor evaluation of the claimant's upper and lower extremities, he determined that all tested muscle groups had strength ratings of "5" on a five-point scale. EX 2 at 54. In addition, he found that the claimant had normal sensation during sensory examinations of his upper and lower extremities and negative results on Phalen tests. EX 2 at 54. Dr. Woodward also reviewed x-rays and MRIs from the claimant's medical record, and observed small "disc bulges" at levels C3-4 and C4-5 as well as "larger disc bulges" at C5-6 and C6-7 on the cervical MRI taken on October 14, 2002. EX 2 at 56. In concluding his report, Dr. Woodward set forth five "impressions" concerning the claimant's condition. EX 2 at 56. His first impression was that the claimant suffered from "[a]ge-related degeneration of the right shoulder, preexisting, manifest by degenerative changes in the acromioclavicular joint, the biceps tendon, and apparently the rotator cuff." EX 2 at 56. The second impression was "[s]tatus postoperative suture of the biceps tendon and apparently repair of a rotator cuff tear, preexisting, with persistent shoulder stiffness." EX 2 at 56. The final three impressions were a resolved right shoulder contusion, untreated trochanteric bursitis, and pre-existing cervical spondylosis. EX 2 at 56. Dr. Woodward also opined that the claimant was able to return to work, that his condition had become permanent and stationary, that any permanent impairment was entirely due to conditions that existed prior to the claimant's work injury, and that the claimant needed no further medical care for that injury. EX 2 at 56.

On May 6, 2003, Dr. Kralick re-examined the claimant and reported that he was complaining of persistent neck pain that was radiating into his proximal right arm and more recently into his left upper extremity. CX 6 at 55. Dr. Kralick further noted that rotation of the claimant's neck was stiff, especially on the left and that the claimant's left elbow flexion and right deltoid function were weak. CX 6 at 55. Dr. Kralick also reviewed the October 14, 2002 MRI scan of the claimant's cervical spine and reported seeing a "disc herniation centrally at the C5-6 level and towards the left" and "[s]ignificant degenerative changes . . . at C6-7 centrally and towards the right with disc space narrowing and foraminal involvement." CX 6 at 55. Based on the foregoing information, Dr. Kralick recommended that the claimant consider undergoing disc excisions and interbody fusions at both the C5-6 and C6-7 levels. CX 6 at 55.

On July 16, 2003, Gallagher Bassett informed the claimant that it would "accept" his cervical condition, but would not authorize surgery on his cervical spine. CX 26 at 265. As grounds for refusing to authorize the surgery, a Gallagher Bassett representative cited the reports of Dr. Woodward and Dr. Waller. In addition, the representative also told the claimant that Dr. Woodward had concluded that the claimant was capable of returning to his job as a gatehouse dispatcher. CX 26 at 265. According to the representative's notes of the conversation, the claimant "disagreed and advised that he would never return to work in any capacity and that he wants to have surgery." EX 26 at 265. The notes further indicate that the claimant also told the Gallagher Bassett representative that the "employer would not take him back anyway without [a] full duty release." EX 26 at 266. The representative then reportedly told the claimant that she had a full duty release from Dr. Neumann and would be faxing it to the employer. EX 26 at 266.

In July 22, 2003, the claimant was re-examined by Dr. Kralick, who noted that the claimant had continuing neck pain and a limited range of motion in his neck. CX 6 at 53. Dr. Kralick's report also indicates that the claimant said that he had decided to undergo two-level

disc surgery on his cervical spine as soon as the insurance details could be worked out. CX 6 at 53. Two days later, the claimant was examined by Dr. Wickler, who observed that the claimant was still having “difficulty with his right shoulder” and repeated his suspicion that the neck and shoulder symptoms were interrelated. CX 3 at 7. Dr. Wicker also indicated that he planned to wait until six months after the claimant’s cervical surgery before re-evaluating his treatment of the claimant’s shoulder. CX 3 at 7.

On October 28, 2003, Dr. Kralick re-examined the claimant and noted that he was complaining of worsening neck pain. CX 6 at 52. Dr. Kralick reiterated his opinion that the claimant’s neck problems were attributable to his work injury and again recommended surgical treatment. CX 6 at 52. Dr. Kralick also opined that the claimant would be unable to return to work as a longshoreman without additional treatment. CX 6 at 52. Likewise, on November 26, 2003, Dr. Henderson wrote a letter opining that the claimant’s “ongoing right-shoulder and cervical symptoms are related to the injury of February 24th 2002.” EX 21 at 473. Dr. Henderson also concluded that the claimant was still unable to return to his work as a longshoreman. EX 21 at 473.

According to the claimant’s trial testimony, beginning in October of 2003 he and Dr. Kralick repeatedly asked Gallagher Bassett to authorize Dr. Kralick to perform surgery on the claimant’s neck, but Gallagher Bassett did not respond until approximately January 10, 2004, which was the same day that the claimant was scheduled to meet with Dr. Kralick for a pre-operation visit. Tr. at 122. At that time, the claimant testified, Gallagher Bassett notified Dr. Kralick that it was refusing to authorize the surgery. Because of this refusal, the claimant sought and obtained authorization for the surgery from the health care plan administered by the Inland Boatman’s Union (“I.B.U.”) Health Benefit Trust. EX 14 at 320-21, EX 21 at 450, 466, 475.

On January 30, 2004, Dr. Kralick performed disc excision and fusion surgery at levels C5-C6 and C6-C7 of the claimant’s cervical spine. CX 6 at 45-47. According to the surgical report, Dr. Kralick removed disc material during the operation. However, the report does not specifically indicate whether Dr. Kralick observed any disc herniations or protrusions. CX 6 at 45-47.

On March 9, 2004, Dr. Kralick reported that the claimant’s surgical incision had healed well and that the symptoms in his upper right extremities had improved. CX 6 at 42. However, he also noted that the claimant continued to experience “residual neck pain and soreness in the right shoulder.” CX 6 at 42. When Dr. Kralick re-examined the claimant on April 20, 2004 he reported that the claimant had “no significant neck pains” but continued to report “some discomfort” in his right shoulder. CX 6 at 40. Accordingly, Dr. Kralick opined that the claimant could return to light duty work similar to “the dispatch position in which he was previously employed.” CX 6 at 40.

On May 11, 2004, the claimant returned to Dr. Wickler to resume treatment for his ongoing right shoulder symptoms. CX 3 at 6. At that time, Dr. Wickler reported that the claimant had experienced a recurrence of right shoulder AC joint symptoms during physical therapy and requested an MRI of his right shoulder. CX 3 at 6. The MRI, which was performed on the following day, showed that the rotator cuff tear shown on the claimant’s previous shoulder

MRI scan had been repaired, but that there was some evidence of “chronic scarring or partial tearing or fraying at the tendinous insertion.” CX 3 at 14. Likewise, when Dr. Wickler reviewed the MRI results, he noted that the rotator cuff tear appeared to have healed but that there were “[s]ignificant degenerative changes” that were “consistent with [an] interarticular tear.” CX 3 at 6. On that same day, Dr. Wickler discussed the risks of surgical treatment with the claimant and the claimant informed Dr. Wickler that he wanted his shoulder condition to be surgically treated. CX 3 at 6.

On July 6, 2004, the claimant testified in a deposition and reiterated his willingness and desire to return to his employment as a gatehouse dispatcher, if that kind of work would be available for him in Dutch Harbor. EX 15 at 47-49. He also testified that at that time he was performing home exercises, but did not participate in health club activities. EX 15 at 64. In addition, he testified that his cervical surgery had “absolutely” helped him by eliminating “pain running down [his] right arm, pain above [his] left elbow,” and the feeling that two of his fingers were “frequently falling asleep.” EX 15 at 77-78.

During July of 2004, the parties’ attorneys engaged in negotiations concerning the shoulder surgery recommended by Dr. Wickler. EX 9. During the negotiations, the claimant’s counsel offered to stipulate that the claimant had become capable of performing the duties of a gatehouse dispatcher, if the defendants would authorize Dr. Wickler to perform surgery on the claimant’s right shoulder. EX 9 at 174. On July 30, 2004, the defendants’ attorney sent the claimant’s attorney a letter which stated that the defendants would authorize the shoulder surgery, but were not conceding that the claimant’s work injury had caused any more harm to the claimant’s shoulder than had been diagnosed by Dr. Woodward. The letter also indicated that the defendants would pay the claimant time-loss benefits for a three-to-four-month period following the surgery, but that the defendants would not pay him any time-loss benefits for the period between the date of controversion of benefits and the shoulder surgery. EX 9 at 176. On August 12, 2004, the claimant’s attorney sent the defendants’ attorney draft stipulations concerning the claimant’s shoulder surgery. EX 9 at 179-80. One of the paragraphs in the draft stipulations stated that the claimant had agreed that from March 10, 2004 until the date of his shoulder surgery, he was physically able to perform his gatehouse dispatcher job, and that he would “be able to return to the said job upon attaining maximum medical improvement from the shoulder surgery.” EX 9 at 180. However, there is no evidence that any of the parties or their attorneys ever signed the proposed stipulations.

On September 1, 2004, Dr. Wickler performed an arthroscopic subacromial decompression, an acromioplasty, and an arthroscopic Mumford procedure on the claimant’s right shoulder. CX 3 at 11-13. In his report of the surgery, Dr. Wickler listed as his “Final Diagnosis” the following conditions: post-traumatic AC joint arthritis, recurrent bone spur of the acromion, healed rotator cuff repair, and a healed SLAP repair. CX 3 at 11.

During a follow-up examination on September 3, 2004, Dr. Wickler observed that the claimant was doing well and instructed him to start a therapy program. CX 3 at 6. The claimant’s continued improvement was also documented in subsequent medical examinations.

On October 26, 2004, Dr. Wickler examined the claimant and noted that although he experienced “residual impingement-type-pain” and “coracoid impingement pain on the subscap[.],” his motion was “almost back to normal.” CX 3 at 6. Dr. Wicker also recommended that the claimant continue with physical therapy. CX 3 at 6.

On January 25, 2005, the claimant was re-examined by Dr. Kralick, who reported that the claimant had “occasional stiffness in his neck and right shoulder,” but had denied “specific pain complaints in the neck” as well as any kind of radicular symptoms in his extremities. CX 6 at 39. Nonetheless, Dr. Kralick concluded that the claimant had “significant residual symptoms” and opined that it would “be unwise for him to return to the prior level of job activity involved in long-shore [sic] work.” According to the claimant’s trial testimony, Dr. Kralick believed it unwise to return to the longshore industry after the cervical fusion because of the inclement weather conditions and heavy work. Tr. at 178.

On February 3, 2005, Dr. Wickler re-examined the claimant and opined that the claimant should not return to heavy work as a longshoreman but that some light duty work such as working as a dispatcher would be appropriate for the claimant. CX 3 at 5. He added that if such light duty work were not available to the claimant, he should start vocational rehabilitation. CX 3 at 5. Dr. Wickler also gave the claimant a prescription for a six-month membership to an athletic club in lieu of formal physical therapy. CX 3 at 5. However, because of the defendants’ refusal to authorize payment for the membership, the claimant eventually paid the membership costs himself. Tr. at 135-36.

On July 12, 2005, Dr. Wickler concluded that the claimant’s shoulder condition had reached the point of maximum medical improvement and requested that the claimant undergo a physical capacities evaluation to determine his ability to perform physical labor. CX 3 at 5. On the following day, Larry Seethaler, a licensed physical therapist, conducted a physical capacities evaluation on the claimant and found that the claimant is restricted to “light-medium” work, which he defined as occasionally lifting 30 pounds, frequently lifting 15 pounds, and constantly lifting 10 pounds. CX 1 at 1-3. In addition, on July 14, 2005, Dr. Wickler dictated a letter in which he explained that the claimant had reached maximum medical improvement and concluded that the claimant’s shoulder injury had resulted in a 14% upper extremity impairment pursuant to the provisions of Table 15-27 at page 508 of the Fifth Edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment*.

On October 21, 2005, the claimant wrote to Mike Lynch, who was the manager of the CSX Lines terminal in Dutch Harbor at the time of the claimant’s injury and had continued in that job after Horizon Lines had taken over management of the terminal. EX 24 at 212. In his letter to Mr. Lynch, the claimant noted that he had been previously told that there was no light work available to him at CSX Lines and asked if there had been any change in that policy since Horizon Lines had taken over the CSX terminal in Dutch Harbor. EX 24 at 212. The letter also explained that he had not achieved a full recovery from his February 2002 injury, but that Dr. Wickler and Dr. Kralick had concluded that he could perform light duty work. EX 24 at 212.

On October 26, 2005, Dr. Wickler reviewed Mr. Seethaler’s evaluation of the claimant’s physical capacities and agreed that it was consistent with his clinical examinations of the

claimant. Dr. Wickler also agreed that the claimant had permanent lifting and carrying restrictions that restricted him to “light-medium” level work. CX 2 at 4.

On November 7, 2005, Mr. Lynch replied to the claimant’s letter of October 21, 2006 by informing the claimant that a collective bargaining arrangement at the port of Dutch Harbor precludes longshore workers from returning to work on a light duty basis and that only those workers who have full-capacity releases can be re-employed at the port. CX 24 at 211, Tr. at 241. Ten days later, Horizon Lines posted a notice of a job opening in Dutch Harbor for a gatehouse dispatcher. CX 25 at 212, Tr. at 271-72, 292-93. The announcement indicated that the minimum requirements for job applicants included computer literacy and supervisory experience. CX 25 at 212. In addition, the announcement specified that persons performing the job “must be willing and able to receive instructions and direct longshore personnel in accordance to company directives and AALA agreement,” be “self motivated” have “strong communication and organizational skills,” and be capable of performing “multiple tasks with a high attention to detail.” CX 25 at 212.

On December 3, 2005, Dr. Woodward testified by deposition regarding his April 2003 examination of the claimant and resulting opinions. EX 16. During the deposition, Dr. Woodward testified that his examination indicated that the claimant generally had “good” ranges of motion in his shoulders and cervical spine, but some loss of external rotation in his right shoulder and slightly less-than-average left lateral motion in his neck. EX 16 at 20, 29. He also opined that the claimant’s shoulder and cervical surgeries were necessitated by conditions that were due solely to his preexisting osteoarthritis and not to his work-related injury. EX 16 at 17, 20, 27. Dr. Woodward did acknowledge, however, that trauma can sometimes aggravate an asymptomatic degenerative joint disease such as osteoarthritis. EX 16 at 50-51. In addition, during the deposition the parties stipulated that, if asked, Dr. Woodward would testify that in his opinion the claimant is capable of performing all the light-to-medium jobs included in an occupational report attached to the deposition transcript. EX 16 at 28-29.

In explaining his opinion concerning the claimant’s right shoulder, Dr. Woodward noted that the October 5, 2001 MRI scan of the claimant’s shoulder showed “moderately severe acromioclavicular osteoarthritis with spurs” and observed that the claimant had told Dr. Wickler in 2001 that he had been experiencing difficulties with his right shoulder “for several years.” EX 16 at 9-10. In addition, Dr. Woodward admitted that it’s “possible” that the claimant’s right shoulder condition could have been aggravated when he fell, but opined that no such aggravation actually occurred because a subsequent MRI of the claimant’s right shoulder showed that the claimant’s “[m]oderately severe acromioclavicular osteoarthritis” was unchanged. EX 16 at 21 57. In addition, he pointed out that Dr. Wickler’s initially diagnosed the claimant’s right shoulder injury as being merely a “first degree sprain of the acromioclavicular joint.” EX 16 at 15-16. Dr. Woodward also noted that Dr. Wickler’s report of his second surgery on the claimant’s right shoulder indicated that the earlier rotator cuff repair and SLAP lesion repair were intact. EX 16 at 55-56. Thus, Dr. Woodward opined, the only reason for the second surgery was to correct “preexisting unrelated osteoarthritis of the acromioclavicular joint” and not for the purpose of treating any work-related injury. EX 16 at 17, 20-21.

Dr. Woodward also provided various reasons for his opinion that the claimant's work injury did not cause any harm to the claimant's cervical spine. In particular, he asserted that there were no objective findings of reduced ranges of motion in the claimant's neck until eight or nine months after his work injury and opined that the disc abnormalities shown on the MRI scan of the claimant's cervical spine were solely as a result of degenerative changes rather than the result of any work-related trauma. EX 16 at 26, 43. In explaining his opinion about the degenerative changes in the claimant's cervical spine, Dr. Woodward noted that "[o]steophytes are characteristic of degenerative changes" and pointed out that Dr. Kralick's operative report indicates that he observed "osteoarthritic ridging" and osteophytes at the C5 and C6 levels of the claimant's cervical spine. EX 16 at 23. Dr. Woodward acknowledged that he had described the "protrusions" and "extrusions" mentioned in the radiologist's report of the claimant's cervical MRI as "bulges," but asserted that there is no standardization of the language used by radiologists to describe disc abnormalities. EX 16 at 39-40, 62. He also testified that the references in Dr. Kralick's surgical report to removal of disc material from the claimant's cervical spine don't necessarily refer to material from herniated discs because fusion surgery always requires the removal of disc material, even when there are no disc herniations. EX 16 at 45. Dr. Woodward also acknowledged that such fusion surgeries are sometimes performed to relieve cervical radiculopathy or an injury to a nerve root, but asserted that in the claimant's case there was no evidence of right radiculopathy or neurological deficits consistent with disc pressure on nerve root. EX 16 at 8, 23-24.

On December 31, 2005, Mr. Lynch sent the claimant a second response to his inquiry about returning to work as a gatehouse dispatcher. EX 38 at 576. In this response, Mr. Lynch asserted, "you would likely be able to be employed under the special agreements between the employers and the union for the positions of a checker and certain gang boss/walking boss jobs, as well as Union Hall dispatcher. I presume that you know that other union members with permanent disabling conditions have been employed in skilled positions over a number of years. With your A card I presume that you would easily be able to obtain work with the employers in those positions even with your work restrictions." EX 38 at 576.

On January 4, 2006, Dr. Kralick reviewed the physical capacities evaluation prepared by Mr. Seethaler and agreed that the claimant should be permanently restricted to "light-medium" level work. CX 5 at 38.

During the trial, Mr. Lynch testified that the letter he sent the claimant on December 31, 2005 was intended to ensure that Horizon Lines complied with the Americans with Disabilities Act requirement that employers provide reasonable accommodations to injured workers. Tr. at 260-65, 276-77. Mr. Lynch also testified that although CSX Lines employed two gatehouse dispatchers at the time of the claimant's work injury, after the claimant stopped working in March of 2002 the company decided not to hire a permanent replacement and instead supplemented the work of the other permanent dispatcher with the services of temporary or part-time workers. Tr. at 252-54. According to Mr. Lynch, the decision not to hire a permanent full-time replacement for the claimant was also attributable to a decrease in the terminal's workload, improved technology, and a decision to no longer keep the gatehouse open 24 hours a day. Tr. at 250-53, 280-81, 290.

Mr. Lynch also testified that since the early 1990s longshore employers at Dutch Harbor have not allowed injured longshore workers to return to work unless they have a “full work release” and the “union has cooperatively agreed to support that program.” Tr. at 258-60, 279-80. However, he explained, there have been occasions when special arrangements were made to allow employees who lacked full-duty releases to take some of the less physically demanding longshore jobs. Tr. at 258-59, 261-62. In this regard, Mr. Lynch acknowledged that as Horizon’s terminal manager he had the authority to make accommodations or special arrangements that might have enabled the claimant to return to work as a gatehouse dispatcher. Tr. at 275.

According to the claimant’s trial testimony, he has not worked since his February 24, 2002 work injury, but would return to work as a gatehouse dispatcher if he were not required to exit the gatehouse. Tr. at 157, 192-93. He also denied ever telling a Gallagher Bassett representative that he had “no intention” of returning to work under any circumstances. Tr. at 190. However, the claimant acknowledged that no longer resides in Dutch Harbor and has sold a home that he previously owned near that port. EX 2 at 53.

ANALYSIS

The parties have stipulated, *inter alia*: (1) that the claimant sustained a slip-and-fall injury arising out of and in the course of his employment by CSX Lines on February 24, 2002, (2) that the claimant was injured at a maritime situs, (3) that the claimant provided timely notice of his injury and filed a timely claim, and (4) that an employer-employee relationship existed between the claimant and CSX Lines at the time of the injury. Tr. at 37-39, 47-48.

The following issues are in dispute: (1) the applicability of subsection 2(3)(A) of the Longshore Act to the claimant, (2) the existence of a causal relationship between the claimant’s work-related injury of February 24, 2002 and his cervical and right arm impairments, (3) the extent of the employer’s liability for medical expenses, (4) the appropriate method for calculating the claimant’s average weekly wage, (5) the date the claimant’s injuries reached the point of maximum medical improvement, and (6) the extent of the claimant’s entitlement to disability benefits.

1. Applicability of the Subsection 2(3)(A) Exclusion

A claim for a work-related injury is not compensable under the Longshore Act unless the injury occurred while the injured worker had “status” as a maritime employee. *See Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 45-46 (1989); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 267 (1977). Under subsection 2(3) of the Act, maritime status is generally granted to any person “engaged in maritime employment, including “any longshoreman or other person engaged in longshoring operations.” However, in 1984 Congress amended subsection 2(3) to explicitly exclude various categories of maritime workers from coverage under the Act. One of these categories of excluded maritime workers is defined in subsection 2(3)(A) of the Act as including “individuals employed exclusively to perform office clerical, secretarial, security, or data processing work” if such workers are covered under a state workers’ compensation statute.

In the years following the enactment of the 1984 amendments, the Benefits Review Board (BRB) has applied the subsection 2(3)(A) exemption to workers whose jobs are limited to the performance of routine clerical activities of the kind that are typically performed in office settings. See *Hall v. Newport News Shipbuilding and Dry Dock Co.* 24 BRBS 1 (1990) (holding that a claimant who performed “solely data processing functions” as a keypunch operator was excluded from Longshore Act coverage); *Williams v. Newport News Shipbuilding and Dry Dock Co.*, 28 BRBS 42 (1994) (holding that a clerk who was responsible for copying and reproducing documents in an office setting was excluded from coverage). Likewise, the BRB has applied the exemption to such workers in cases where their clerical duties would sporadically require them to leave their office work sites or whose out-of-office activities were merely incidental to their clerical duties. See *Stalinski v. Electric Boat Corp.*, 38 BRBS 85 (2005) (affirming a decision that a quality assurance clerk, whose duties included typing, filing, verifying data, and data entry was excluded from Longshore Act coverage because she did not make “substantive decisions,” primarily worked in an office setting, and left her office work space only on rare occasions for purposes incidental to clerical work); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996), (holding that a claimant who performed various clerical duties in a trailer office but occasionally went outside and on-board ships under construction was not covered under the Act because her trips away from her office were “merely incidental to her clerical work” and “sporadic”). In addition, in cases arising in the Third Circuit the BRB has applied the exemption to office workers whose jobs do not involve loading or unloading cargo because such workers do not even have maritime status under the Third Circuit’s decisions in *Maher Terminals v. Farrell*, 548 F.2d 476 (3rd Cir. 1977), and *Sea-Land Services, Inc. v. Rock*, 953 F.2d 56 (3rd Cir. 1992). See *Sette v. Maher Terminals, Inc.*, 27 BRBS 224 (1993) (holding that under the Third Circuit’s decisions in *Farrell* and *Rock*, a “delivery clerk” who worked in a marine terminal office and gave truck drivers paperwork they needed when removing cargo from a container yard and exiting the terminal was not covered under the Longshore Act).

However, when a worker’s duties have included tasks that are not exclusively clerical or entailed at least some tasks that are regularly performed outside an office, the BRB and the courts have held that the exception is inapplicable. See *Wheeler v. Newport News Shipbuilding and Dry Dock Co.*, 39 BRBS 49 (2005) (holding that a senior engineering analyst did not fall under the clerical exclusion because his duties “involved the exercise of judgment and expertise beyond that exhibited by clerical workers” and were “not performed exclusively in an office”³); *Boone v. Newport News Shipbuilding and Dry Dock Co.*, 37 BRBS 1 (2003)(holding that a claimant was not excluded from Longshore Act coverage even though she was a clerk within the definition of subsection 2(3)(A), because all her work was performed in a warehouse rather than in an office); *Lennon v. Waterfront Transport*, 20 F.3d 658 (5th Cir. 1994) (holding that a “marine dispatcher” whose duties were mostly clerical was not subject to the subsection 2(3)(A)

³ In *Wheeler*, the claimant primarily worked in an office at a desk, and was responsible for visually inspecting parts, filling out paperwork necessary to obtain replacement parts, consulting with engineers, and reviewing plan specifications. *Id.* at 51-52. He occasionally left his office area to perform his duties at the employer’s shops, warehouses, or vessels. *Id.* The BRB determined that the claimant’s employment duties were more than mere data entry and processing because he was required to interpret, review, and analyze information and make suggestions. *Id.* Accordingly, the BRB affirmed the administrative law judge’s finding that the claimant’s job as a senior engineering analyst “required the exercise of judgment and expertise of a kind that goes beyond the simple record making or record storage typical of clerical work.” *Id.* at 52.

exclusion because his job also required him to regularly lift 35-to-50-pound boxes of motion-picture film that was destined to be loaded on passenger ships). *See also Lockheed Martin Corp. v. Morganti*, 412 F.3d 407 (2nd Cir. 2005) (reasoning that the reference to “data processing” in the subsection 2(3)(A) exclusion is limited to workers who exclusively process data and paperwork and was therefore inapplicable to a “test engineer” who also analyzed data).

Likewise, the BRB has held that the subsection 2(3)(A) exemption is inapplicable when a worker’s duties are integral to loading or unloading ships. *See Jannuzzelli v. Maersk Container Service Co.*, 25 BRBS 66 (1991) (finding a “timekeeper” who usually worked in an office preparing payrolls and allocating payroll costs nonetheless “performed functions which were maritime and integral to the loading and unloading process” because his duties included responsibility for “checking in” longshore workers on the docks and asking a hiring hall send more men when help was needed); *Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Association*, 22 BRBS 434 (1989) (holding that a “night dispatcher” was not excluded from coverage under subsection 2(3)(A) because, *inter alia*, his obligation to ensure that work crews were fully manned to load and unload ships was “not exclusively clerical” and was “integral to the longshoring process”); *Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989) (holding that subsection 2(3)(A) did not preclude a “clerk-checker” from recovering Longshore Act benefits for an injury he suffered while working as a “clerk” because the claimant’s work hours were tied to the movement of cargo, his clerical duties pertained to cargo removal, and he “was subject to reassignment as a checker”); *Riggio v. Maher Terminals*, 31 BRBS 58 (1997) (holding that even in the Third Circuit, work as a “checker” is “indisputably longshore activity” and not within the scope of the subsection 2(3)(A) exclusion).

In this case, the defendants concede that the claimant had status as a maritime worker under the provisions of subsection 2(3) at the time of his work injury, but argue that he is not entitled to Longshore Act benefits because his job as a gatehouse dispatcher entailed only office clerical duties and was therefore within the scope of the subsection 2(3)(A) exclusion. Conversely, the claimant contends that his job as a gatehouse dispatcher did not fall within the scope of the exclusion.

Three witnesses provided detailed testimony concerning the gatehouse dispatcher’s duties: Michael Lynch, the terminal manager; Bruce McConnell, the gatehouse manager; and the claimant.

According to Mr. Lynch, CSX Lines’ gatehouse dispatcher in Dutch Harbor normally works in a double-wide modular trailer “gatehouse” that sits on a concrete foundation beside a 70-foot long Toledo truck scale. Tr. at 255. Mr. Lynch explained that the gatehouse dispatcher’s “desk/work station” is located next to a bay window adjacent to the truck scale so that the dispatcher can exchange papers and communicate with truck drivers as they come across the scale. Tr. at 255. In Mr. Lynch’s view, the gatehouse dispatcher’s job duties also include responsibility for tracking the movement of freight into and out of the employer’s Dutch Harbor terminal and an obligation to efficiently dispatch drivers to deliver and pick up “vans” for customers at “shore plants.” Tr. at 254-55. He further described the job as requiring the dispatcher to sit at a desk and as sometimes being so monotonous that dispatchers will carry a cordless phone and “walk around the gatehouse just to stretch their legs.” Tr. at 255-56.

However, Mr. Lynch acknowledged that on some occasions gatehouse dispatchers have gone outside the gatehouse to verify a container location if “yard dogs” who normally have this duty were unavailable. Moreover, he added, “[w]e sure don’t want the dispatcher not to go out there if nobody else is available.” Tr. at 257. Likewise, he testified, there have been “rare” situations where containers that were bulging after transportation over rough seas have been parked next to the gatehouse and inspected. Tr. at 257. In such situations, Mr. Lynch remarked, “[i]f no one else is on duty dispatchers have to be conscientious enough to take it upon themselves and do what needs to get done in regards to that.” Tr. at 257-58.

According to Mr. McConnell’s testimony, the primary duties of a gatehouse dispatcher at Dutch Harbor are answering phone calls from customers seeking to have freight picked up or delivered, scheduling pick ups and deliveries, dispatching truck drivers to the customers, logging the dispatches into a computer, and running reports concerning these activities. Tr. at 286-87. Mr. McConnell further testified that the dispatcher’s duties are performed in the gatehouse and that he could not think of “a lot” that the dispatcher would do outside of the gatehouse. Tr. at 285, 287. In particular, Mr. McConnell testified that he could not think of any circumstances that would require the dispatcher to go the company’s dock, which he noted was over a mile away, and commented that “it’s not something that would be commonly done.” Tr. at 288-89. He also testified that truck drivers are the ones with responsibility for opening the doors on shipping containers and, to his knowledge, such work “isn’t typically done” by dispatchers. Tr. at 288-89. However, Mr. McConnell acknowledged that although “most of the time” so-called “yard dogs” are responsible for searching the terminal’s freight yard to find missing container numbers, he’s sure that on some occasions a dispatcher has gone out to the freight yard to look for a missing number. Tr. at 287-88, 295. He also acknowledged that the gatehouse dispatcher has “supervisory” responsibilities insofar as the dispatcher is required to supervise “road drivers” in performing pickups and deliveries and to the extent that the dispatcher has to tell top pick operators to go to certain stacks and pick up certain containers. Tr. at 294. Mr. McConnell also conceded that the work of the gatehouse dispatcher is a “pretty essential part” of the operation of his firm’s Dutch Harbor terminal. Tr. at 296.

The claimant’s testimony concerning his duties as a gatehouse dispatcher is generally consistent with the testimony of Mr. Lynch and Mr. McConnell, but contains more details concerning the various functions he performed while working as a gatehouse dispatcher.

For example, the claimant’s testimony indicates that his job required him to plan and supervise the storage and movement of the ocean shipping containers that are constantly moving through the employer’s Dutch Harbor terminal. Thus, the claimant testified, performance of his job required him to work closely with two yard foreman to organize the containers in the terminal’s freight yard. Tr. at 85-86, 88-89. Likewise, he testified that he advised yard foremen about outbound containers that needed to “get out of town as soon as possible” and also told them which vessel hatches needed to be unloaded first to ensure prompt delivery of incoming containers needing expedited handling. Tr. at 86-89. In addition, the claimant testified that when factory trawler ships docked at Dutch Harbor and unloaded the equivalent of 40 to 60 containers of frozen fish, the gatehouse dispatcher would be responsible for determining what types of containers would be needed for transshipping the cargo to other ports, ensuring the availability of each type of container, and finding yard space for efficiently storing the necessary

containers. Tr. at 90-92. According to the claimant, performance of these and similar responsibilities, required him to do “a lot of... thinking” and meant that he had to “make decisions all day long.” Tr. at 198-99.

The claimant’s testimony also indicates that his job as a gatehouse dispatcher required him to conduct various types of inspections of the containers moving into and out of the employer’s freight yard. For example, the claimant explained that when a driver delivering a loaded container appeared outside the dispatcher’s window, part of the gatehouse dispatcher’s job was to make sure that there was a load tag on the front of the container, that the driver’s paperwork had all the important information, and that the load wasn’t excessively overweight. Tr. at 94-95, 210-13. In addition, the claimant testified, as the driver pulled away, the dispatcher would “get a visual” on the container doors to make sure that they were closed and that a seal was on the door. Tr. at 212. Likewise, the claimant added, on those occasions when a driver told the gatehouse dispatcher that a container might have been improperly loaded, the dispatcher might have to go outside the gatehouse to look inside the container. Tr. at 95. In such situations, the claimant explained, it would be necessary to break the seal on the container, attach a new seal, and inform others that the seal had been changed. Tr. at 95-96, 212-13. Similarly, he added, the dispatcher might have to leave the gatehouse to inspect a container that a driver didn’t believe was in suitable condition to be loaded. Tr. at 212.

According to the claimant’s testimony, his job responsibilities also made it necessary for him to occasionally leave the gatehouse and go to other locations in or near the employer’s terminal. For instance, the claimant testified, on weekends, gatehouse dispatchers “ran the show” and during such periods it might be necessary for the dispatcher to go to the freight yard to locate recently off-loaded containers if the locations of the containers had not yet been entered into the gatehouse computer. Tr. at 97-98. On other occasions, he added, the gatehouse dispatcher might have to accompany customers to the freight yard so that the customers could see what was inside particular incoming containers. Tr. at 98. In addition, the claimant recalled that there were times when he would drive to a nearby American President Lines (APL) dock to determine if there were any CSX containers that were fully loaded and ready to be picked up. Tr. at 195-96. If he found such a CSX container, he testified, he would close the container doors, attach a seal, and later direct a driver to pick up the container. Tr. at 195-96. The claimant’s testimony also indicates that he would sometimes leave the gatehouse to help a driver or customer deal with some kind of unusual problem that was preventing freight from being moved as planned. As examples of such events, the claimant explained that sometimes drivers would ask that someone “hold the door” so they could back a container up to a loading dock or would need someone to bring them a “load lock” to help in handling containers that had freight packed right up to the doors. Tr. at 99, 176. On other occasions, he noted, he might go to a dock to help a driver deal with broken pallets of frozen fish that were slowing down an unloading process. Tr. at 99-100. The claimant’s testimony about his out-of-office activities was corroborated in part by the testimony of Dan Kondak, a longshoreman who has worked at Dutch Harbor since 1981. Tr. at 225-26. According to Mr. Kondak, while working as a longshoreman he would “generally” see the claimant working at the gatehouse, but “it wouldn’t be uncommon to see him anywhere.” Tr. at 229

Although the claimant's testimony indicates that there were a number of different reasons for a gatehouse dispatcher to leave the gatehouse, the claimant acknowledges that his departures from the gatehouse were not regularly scheduled events and that their frequency varied depending on the circumstances. In fact, he testified, there were some weeks when he never left the building and other times when he would leave the gatehouse on two to three occasions in a single day. Tr. at 209. On an average basis, the claimant estimated, he went to the freight yard about once each weekend and to the dock no more than two to three times a month. Tr. at 209. The claimant also acknowledged that at least some of his activities outside the gatehouse were not part of the dispatcher's formal job description, but asserted that his employer "certainly" knew of the activities and did not discourage them. Tr. at 100-01.

In contending that gatehouse dispatchers are excluded from Longshore Act coverage, the defendants acknowledge the evidence indicating that gatehouse dispatchers must occasionally leave the gatehouse to perform some parts of their jobs. However, the defendants argue that these out-of-the-office activities are "episodic, momentary, and in furtherance of clerical duties" that do not expose the gatehouse dispatchers to "the hazards of longshoring." In contrast, the claimant contends that his job was not "exclusively clerical" and therefore would not fall within the scope of the subsection 2(3)(A) exclusion even if he never had to leave the gatehouse.

After considering all the relevant evidence and precedents, it has been concluded that the work the claimant performed as a gatehouse dispatcher was not exclusively clerical and that the exclusion is therefore inapplicable to the claimant. Indeed, the evidence shows that major elements of the claimant's work duties made it necessary for him to routinely make decisions requiring a far greater degree of judgment and expertise than would normally be expected from workers whose duties are limited to document filing, data entry, and record keeping. For example, the claimant's work with the yard foremen in organizing the storage of containers in the employer's freight yard and his responsibility for making sure that the necessary quantities and types of containers were available for the prompt transshipment of frozen fish are just two of the claimant's job duties that require experience and expertise not expected from ordinary clerical workers. Similarly, the evidence shows that the claimant had to exercise both analytical and supervisory skills not required from clerical workers when he worked with yardmen to speed up the departure and delivery of containers needing expedited handling. In addition, even if the claimant's work in dispatching drivers could be characterized as being clerical, the evidence shows that the claimant's dispatching duties also implicitly included an additional responsibility that required him to do whatever was reasonably necessary to solve problems that arose when drivers were delivering and picking up cargo, even if he had to leave the gatehouse to locate a missing container, open a container to determine its contents, or help a driver deal with an unexpected difficulty. It is also noted that these kinds of non-clerical activities by the claimant were hardly the *ultra vires* acts of an overenthusiastic employee. To the contrary, the December 2005 vacancy announcement for a gatehouse dispatcher shows that the employer believes that "supervisory experience" and "organizational skills" are necessary to perform the job. CX 25 at 212 (vacancy announcement). Likewise, Mr. Lynch's trial testimony shows that the employer expects gatehouse dispatchers to do whatever needs to be done to serve the customers. Tr. at 257-58 (testimony of Mr. Lynch).

2. Relationship between the Work Injury and the Claimant's Cervical and Right Shoulder Impairments

Under subsection 2(2) of the Act, a worker's injury is not compensable unless there is a showing that the injury arose out of and in the course of the worker's employment. Claimants are aided in this regard by subsection 20(a) of the Act, which provides that in proceedings to enforce a claim under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary—(a) that the claim comes within the provisions of this Act." However, to invoke this presumption, a claimant must prove that he or she suffered some harm or pain and that working conditions existed or an accident occurred that could have caused the harm or pain. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Thus, a claimant has the burden of proving the existence of working conditions or an accident that could have caused his or her impairment, and merely proving that an impairment exists is not enough to invoke the presumption. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 (1982) (holding that "[t]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer"). Once the subsection 20(a) presumption has been properly invoked, the employer is assigned the burden of presenting substantial evidence to counter the presumed relationship between the claimant's impairment and its alleged cause. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). If the presumption is rebutted, it falls out of the case and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). Under the decision of the Supreme Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the ultimate burden of proof then rests on the claimant.

In this case, the claimant asserts that the surgeries on his neck and right shoulder as well as the corresponding periods of temporary disability and related permanent impairments are all attributable to the work-related injury he suffered on February 24, 2002. In contrast, the defendants assert that there is no causal relationship between the claimant's work injury and either of the surgeries. Rather, they contend, any disability or need for medical treatment attributable to the work injury ended within a few months after the injury. Analysis of the evidence supporting these contentions is set forth below.

A. Cervical Impairment

In order to support his claim that his work injury resulted in harm to his neck, the claimant has submitted into evidence a radiologist's report indicating that an October 14, 2002 MRI of his cervical spine showed a disc "protrusion" at level C6-7 and a disc "extrusion" at level C5-6. CX 7 at 69. In addition, the claimant has submitted medical records showing that he complained of nearly constant neck pain to Dr. Henderson on March 21, 2002 and that on that same date Dr. Henderson reported positive findings on a test for cervical nerve root compression. CX 10 at 129-30. Hence, the claimant is entitled to invoke the subsection 20(a) presumption if he has provided evidence indicating that events occurring during the course of his employment by CSX Lines could have caused these cervical abnormalities. In order to satisfy this requirement, the claimant has produced statements from Dr. Henderson, Dr. Kralick, and Dr. Wickler indicating that they all have reason to believe that his cervical ailments were caused by trauma from his fall. CX 10 at 92 (Dr. Henderson), CX 6 at 52 (Dr. Kralick), EX 21 at 453 (Dr.

Wickler). All of the foregoing evidence is entirely credible. Accordingly, the claimant has presented evidence that is sufficient to warrant invocation of the subsection 20(a) presumption.

In response, the defendants rely on testimony and a medical report in which Dr. Woodward opines that the claimant's cervical ailments are solely attributable to his pre-existing degenerative osteoarthritis. EX 2, EX 16. In addition, the defendants argue that Dr. Woodward's opinion is consistent with Dr. Waller's characterization of the claimant's cervical spine disorder as being "degenerative." CX 29 at 281-83. Such evidence is substantial enough to rebut the subsection 20(a) presumption. It is therefore necessary to weigh all of the evidence to determine if the claimant has shown a causal relationship between his employment and his cervical impairment. After weighing all of the evidence, it has been concluded that the claimant has met his burden of showing such a causal connection by a preponderance of the evidence. There are four reasons for this conclusion.

First, as noted by Dr. Henderson, there is no evidence that the claimant ever had any symptoms of a neck impairment prior to his work injury of February 24, 2002. CX 10 at 92.

Second, medical records indicate that the claimant sought treatment for neck pain within a few weeks after his work injury and that as early as March 21, 2002, he reported to Dr. Henderson that he was experiencing constant pain in the left side of his neck. CX 10 at 129. Likewise, on that same day, Dr. Henderson found evidence of cervical nerve root compression and Dr. Wickler reported that the claimant had complaints of "mid and upper thoracic pain" that he attributed to the claimant's work injury. CX 10 at 129 (Dr. Henderson), CX 3 at 10 (Dr. Wickler). Although the claimant did not mention any neck symptoms when he reported his injuries to the employer on February 24, 2002, it is entirely possible that he conflated any neck symptoms with the symptoms of his right shoulder injury. Moreover, it is likely that any neck pains the claimant might have felt during the following days would have been partially or wholly masked by the pain medications prescribed for him at the Illiliuk Family and Health Services. EX 31 at 566 (showing that the claimant was prescribed Vioxx and Tylenol No. 3 for pain relief on February 28, 2002).

Third, although Dr. Woodward has opined that the claimant's neck impairment is entirely degenerative and unrelated to his work injury, his opinion is less convincing than the opinions of Dr. Henderson, Dr. Kralick, and Dr. Wickler, all of whom conducted many more examinations of the claimant than Dr. Woodward and thus have a greater knowledge of his medical history. Moreover, even though Dr. Waller did describe the claimant's neck impairment as being "degenerative," review of Dr. Waller's report clearly indicates that the only issue he thought he was addressing in the report was "whether or not surgical fusion of the degenerated disc will solve the problem." CX 29 at 283. Hence, any opinion he may have seemed to express concerning the cause of the claimant's impairment was entirely gratuitous and therefore unlikely to have been carefully considered. Moreover, there is no reason to assume that Dr. Waller has ruled out the possibility that a pre-existing degenerative condition was in some way aggravated by the claimant's work injury. It is also noted that Dr. Woodward's opinion is further undermined by the fact that he has partially based his opinion on the factually incorrect assumption that the claimant did not have any loss of motion in his cervical spine until eight or nine months after his work injury, even though medical records clearly show that Dr. Henderson found a loss of

cervical range of motion as early as April 22, 2002. EX 16 at 26 (Dr. Woodward's deposition testimony), EX 30 at 547 (report of Dr. Henderson). Moreover, even though there is no formal standardization of language used by radiologists to describe disc abnormalities, Dr. Woodward's use of the term "bulges" to describe the disc abnormalities shown on the MRI scan of the claimant's cervical spine does not appear to be consistent with the radiologist's report. That report, unlike Dr. Woodward, uses the words "protrusion" and "extrusion," which are terms that are more consistent with a traumatic injury than the word "bulge," which implies that an abnormality is solely due to a gradual process.

Fourth, the defendants are unconvincing in contending that the claimant is not a credible witness because he allegedly attempted to "influence the opinions" of his medical providers on questions of causation and treatment. Although the record does contain various letters that the claimant sent to his medical care providers concerning his workers' compensation claim, there is nothing in any of these letters indicating that the claimant ever made any misrepresentations to these providers or that that he ever asked any of them to make misrepresentations on his behalf. Similarly, the defendants' post-trial brief is unpersuasive insofar as it argues that the claimant admitted to a Gallagher Bassett representative that he had "no intention" of ever returning to work. Although the record does include notes of a telephone conversation which indicate that the claimant told a Gallagher Bassett representative that he "would never return to work in any capacity," the claimant has denied telling the representative that he had "no intention" of returning to work. CX 26 at 265-66 (Gallagher Bassett records), Tr. at 190 (claimant's testimony). Moreover, review of the notes indicates that the claimant's statement about never returning to work was made during the course of a discussion in which he was adamantly seeking authorization for surgery on his cervical spine. CX 26 at 265-66. It therefore appears that instead of telling the Gallagher Bassett representative that he had "no intention" of ever returning to work, the claimant was actually arguing that he had no expectation of ever being able to return to work unless he had such surgery.⁴ Conversely, it is unlikely that the claimant would have believed that he could have obtained Gallagher Bassett's authorization for the surgery by telling the representative that he had no intention of ever returning to work. Indeed, the claimant would have surely realized that any such statement would have probably made it less likely that the surgery would be authorized.

⁴ It is noted in this regard that the defendants' post-trial brief suggests that the undersigned Administrative Law Judge's on-the-record comments about a recent whistleblower case concerning Gallagher Bassett's failure to promptly pay a claim by a former employee of United Airlines in some way implies that undue weight will be given to the claimant's version of his conversation with the Gallagher Bassett representative. Any such inference is unwarranted. Although jocular comments were made about the similarities between Gallagher Bassett's failure to pay for the claimant's physical therapy at an athletic club and Gallagher Bassett's failure to promptly pay benefits that had been awarded to a former employee of United Airlines by California's Workers' Compensation Appeals Board, no opinions were expressed concerning the credibility of Gallagher Bassett or its claims examiners. Tr. at 135-37, 191 (comments of the Administrative Law Judge describing how the frequent reassignment of cases to different claims examiners caused Gallagher Bassett to "lose track" of events occurring in those cases). In any event, no consideration whatsoever was given to Gallagher Bassett's handling of the United Airlines claim when resolving any of the issues in this case, including the defendants' allegation that the claimant admitted that he had no intention of ever returning to work. See also *Litky v. United States*, 510 U.S. 540, 553-54 n.2 (1994) (noting that "[t]he objective appearance of an adverse disposition attributable to information acquired in a prior trial is not an objective appearance of personal bias and prejudice, and hence not an objective appearance of improper partiality").

B. Right Shoulder Impairment

In order to support his claim that his work injury resulted in a permanent harm to his right shoulder, the claimant has submitted into evidence various medical records showing that the claimant complained of right shoulder pain and limitations in his ability to use his right shoulder from February of 2002 until undergoing a second shoulder surgery in September of 2004. CX 3. In addition, the claimant has provided medical records showing that after performing that surgery, Dr. Wickler diagnosed the claimant's shoulder condition as "posttraumatic AC joint arthritis." CX 3 at 6. Hence, the claimant is entitled to invoke the subsection 20(a) presumption if he has provided evidence indicating that events occurring during the course of his employment by CSX Lines could have caused, aggravated, accelerated, or otherwise worsened his shoulder condition. As previously noted, the claimant testified that he landed on his right side after slipping on some ice at work on February 24, 2002, and that when he got up he felt a soreness in his right shoulder. Tr. at 110-12. In addition, the claimant has submitted a July 30, 2002 chart note in which Dr. Wickler commented that he thought the increase in the claimant's right shoulder symptoms after February 24, 2002 was "directly related" to that injury. CX 3 at 9. Hence, the claimant has presented enough evidence to justify invoking the subsection 20(a) presumption.

The defendants' contention that there was no causal relationship between the claimant's work injury and his subsequent right shoulder problems is primarily based on the report and testimony of Dr. Woodward. As indicated in that report and testimony, Dr. Woodward has opined that any need for treatment of any right shoulder injuries the claimant might have suffered on February 24, 2002 ended in April of 2002 and that any remaining shoulder symptoms are solely the result of pre-existing osteoarthritis. EX 16 at 17, 20-21. (deposition testimony). As support for this contention, Dr. Woodward has pointed out that the radiologist who interpreted the March 12, 2002 MRI of the claimant's right shoulder did not see any changes in the moderately severe acromioclavicular osteoarthritis shown on the October 5, 2001 MRI of the same shoulder. EX 16 at 15 (testimony of Dr. Woodward), CX 3 at 25 (radiologist's report). Such evidence is substantial enough to rebut the subsection 20(a) presumption. It is therefore necessary to weigh all of the evidence to determine if the claimant has shown a causal relationship between his employment and his right shoulder condition. After weighing all of the evidence, it has been concluded that the claimant has met his burden of showing such a causal connection by a preponderance of the evidence. The following three considerations have led to this conclusion.

First, the evidence indicates that the claimant experienced pain in his right shoulder area immediately after his fall and mentioned "shoulder pain" in the injury report he subsequently gave the employer. CX 19 at 206.

Second, although the radiologist who performed the March 12, 2002 MRI of the claimant's right shoulder did not see any changes in the moderately severe acromioclavicular osteoarthritis shown on the October 5, 2001 MRI of the same shoulder,⁵ there is other credible

⁵ In addition, it is noted that the defendants' post-trial brief also contends that the range of motion in the claimant's right shoulder on March 12, 2002 was actually better than it was when measured by Dr. Wickler on February 5, 2002. This assertion is not entirely correct. Although the measurements made by Dr. Wickler on March 12, 2002

evidence which suggests that the claimant's work injury did in fact cause a long-term aggravation of the claimant's pre-existing right shoulder condition. Most importantly, the evidence shows that in the months following the claimant's work injury he repeatedly complained of a loss of strength and pain in his right shoulder. For example, Dr. Wickler's report of his March 12, 2002 examination of the claimant indicates that the claimant had "lost strength" in his shoulder. Likewise, Dr. Wickler's records show that the claimant complained of pain in the anterior and upper parts of his shoulder during an office visit on March 21, 2002 and continued to complain of shoulder pain during examinations in April, May, June, July, September and October of 2002, March and July of 2003, and May and August of 2004. CX 3 at 6-10. Indeed, as previously noted, on July 30, 2002 these continuing complaints of pain prompted Dr. Wickler to comment that the increase in the claimant's "AC joint symptoms" since his work injury had led him to conclude that there was a direct relationship between the increased symptoms and the work injury. EX 3 at 9. Dr. Wickler's records concerning the claimant's continuing complaints of shoulder pain are corroborated by the August 5, 2002 report of Dr. Neumann, who also noted that the claimant continued to complain of pain in his right shoulder. CX 27 at 272.

Third, Dr. Wickler's opinion concerning the cause of the claimant's right shoulder impairment is more convincing than the contrary opinion of Dr. Woodward. Although the legal doctrine giving special weight to the opinions of treating physicians might not extend to opinions concerning causation issues, in this case there are independent reasons for concluding that Dr. Wickler's opinion is entitled to be given more weight than the opinion of Dr. Woodward. In particular, the record shows that, unlike Dr. Woodward, Dr. Wickler examined the claimant's right shoulder on numerous occasions both before and after the claimant's work injury and that Dr. Wickler also twice performed surgery on the claimant's injured shoulder. In addition, Dr. Wickler's opinion is entitled to greater weight because it is consistent with the portion of the report of the May 12, 2004 MRI indicating that there was evidence of "partial tearing or fraying at the tendinous insertion." CX 3 at 14.

3. Extent of the Employer's Liability for Medical Expenses

Under section 7 of the Act an employer is required to furnish an injured employee such medical treatment as is reasonable and necessary. A claimant establishes a *prima facie* case that medical care is compensable if the evidence shows that a licensed physician has indicated that the treatment is necessary for a work-related condition. See *Turner v. Chesapeake & Potomac Telephone Company*, 16 BRBS 255 (1984). If an employee's request for necessary treatment is denied or neglected by an employer, the employee is entitled to procure the treatment at the employer's expense. See *Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971); *Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir. 1986); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989). In addition, the Court of Appeals for the Ninth Circuit has held that "when an injured employee is faced with competing medical opinions about the best way to treat his work-related injury, each of them medically reasonable,

showed that the claimant had a slightly improved ability to elevate his right arm, his range of external rotation was slightly worse and his range of internal rotation was unchanged. EX 3 at 10.

it is for the patient, not the employer or the [administrative law judge] to decide what is best for him.” *Amos v. Director, OWCP*, 153 F.3d 1051, 1052 (9th Cir. 1998).

In this case, there is a dispute concerning the employer’s obligation to pay a total of \$26,519.00 in unpaid charges for the cervical fusion surgery performed by Dr. Kralick on January 30, 2004. CX 28 at 280, Tr. at 41-44. In this regard, the claimant set forth a *prima facie* case that his cervical surgery is compensable by presenting the medical records showing that this surgery was recommended by Dr. Kralick. In contrast, the defendants contend that even if there was a causal connection between the claimant’s work injury and his cervical condition, they are not obligated to pay the costs of the surgery because it was unnecessary for treatment of the claimant’s cervical injury. As support for this contention, the defendants rely on the April 4, 2003 report of Dr. Waller and on the report and testimony of Dr. Woodward. After considering the foregoing medical evidence, it has been determined that the defendants are liable for the full cost of the claimant’s cervical surgery. There are two reasons for this conclusion.

First, even if there is evidence that Dr. Waller and Dr. Woodward would not have recommended the surgery performed by Dr. Kralick, such evidence by itself would still be insufficient to meet the burden imposed on defendants in the *Amos* decision. As the decision in *Amos* clearly holds, when a treating physician believes that a particular treatment would help a patient, an employer that is opposed to providing the treatment must provide more than a showing that other physicians would not have recommended the treatment. Rather, under the holding in the *Amos* decision, an employer is obligated to pay for any treatment recommended by a treating physician unless the employer can affirmatively show that the proposed treatment is in fact “unreasonable.” See 153 F.3d at 1054. Hence, even if, as alleged, there is evidence that Dr. Waller and Dr. Woodward would not have recommended fusion surgery to treat the claimant’s cervical injury, such evidence would still be insufficient to show that the claimant was not entitled to such surgery.

Second, there is no evidence that either Dr. Waller or Dr. Woodward believed that the surgery performed by Dr. Kralick was unreasonable. Rather, Dr. Waller simply opined that in the absence of a left-sided radiculopathy there was only a “50/50 chance” that the surgery would help the claimant. Such an opinion is plainly not the same as an opinion that the proposed surgery was “unreasonable.” Likewise, Dr. Woodward opined only that there was no causal connection between the claimant’s cervical condition and his work injury. EX 2, EX 16. He did not, however, offer any opinion on whether the surgery was an unreasonable treatment for that condition. Indeed, when questioned about whether the claimant’s cervical fusion was reasonable, Dr. Woodward twice asserted that the claimant’s February 24, 2002 fall did not cause any injury to his cervical spine before finally acknowledging the reasonableness of the surgery by admitting that the claimant “may have required treatment for arthritis of the neck unrelated to the fall.” EX 16 at 27, 52.

4. Average Weekly Wage

Subsections 10(a), 10(b), and 10(c) of the Longshore Act set forth three alternative methods for determining an injured worker’s average weekly wage. Subsection 10(a) applies when an injured worker worked in the same employment for “substantially the whole of

the year” immediately preceding his or her injury. If subsection 10(a) applies, the average weekly wage for a five-day a week worker is based on the worker’s average daily wage, which is then multiplied by 260 and divided by 52. Subsection 10(b) applies when the injured worker was not employed substantially the whole of the year preceding the injury, but there is evidence in the record of wages of “similarly situated” employees who did work substantially the whole of the year. If subsection 10(b) applies, the average weekly wage of an injured five-day a week worker is based on the average daily wage of the similarly situated employees, which is then multiplied by 260 and divided by 52. When neither subsection 10(a) or 10(b) can “reasonably and fairly be applied,” subsection 10(c) provides the general method for determining the appropriate average weekly wage. Although subsection 10(c) does not set forth any specific formula, it requires calculation of an amount that “shall reasonably represent the annual earning capacity of the injured employee.” In that regard, subsection 10(c) further specifies that consideration must be given to the injured worker’s previous earnings in the employment at the time of injury, the earnings of other workers of the same or most similar class in the same employment, and any “other” employment of the injured worker, “including the reasonable value of the services” of any injured worker who was engaged in “self employment.” Administrative law judges have broad discretion in determining an injured worker’s annual earning capacity under the provisions of subsection 10(c). *See Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). In addition, in appropriate cases an administrative law judge may base an average weekly wage calculation on an injured worker’s earnings over a period of more than one year. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819 (5th Cir. 1991); *Walker v. Washington Metropolitan Transit Authority*, 793 F.2d 319, 322 (D.C. Cir. 1986); *Tri-State Terminals v. Jesse*, 596 F.2d 752 (7th Cir. 1979).

In this case, the claimant worked approximately 26 of the 52 weeks preceding his February 24, 2002 work injury.⁶ EX 11 at 258-59. For this reason, the claimant’s average weekly wage cannot be calculated under subsection 10(a). *See Matulic v. Director, OWCP*, 154 F.3d 1288 (9th Cir. 1998). Likewise, subsection 10(b) cannot be applied because there is no evidence in the record concerning the wages of similarly situated workers. As a result, all the parties appear to agree that the claimant’s average weekly wage must be established under the provisions of subsection 10(c).

The claimant contends that his average weekly wage should be calculated by dividing the \$108,416.45 he earned in the 52 weeks prior to his injury by 38—the number of weeks he was not medically disabled from working. As support for this method of calculation, which produces an average weekly wage of \$2,853.08, the claimant relies on the Benefits Review Board’s decision in *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993). In contrast, the defendants argue that because work opportunities for gatehouse dispatchers declined after the claimant’s work injury, his average weekly wage should be based on his average earnings in the five-year period prior to his injury. Under this formula, the claimant’s average weekly wage would be \$1,757.32.

⁶ A summary of the claimant’s earnings during the 52 week period prior to his work injury indicates that he was on vacation for approximately 12 weeks during April, May, June, July, and August of 2001 and also missed approximately 14 more weeks of work for medical reasons following his right shoulder surgery on October 31, 2001. EX 11 at 258-59.

After considering the arguments of the parties, it has been determined that the defendants' proposed formula would not accurately reflect the claimant's true earning capacity at the time of his injury and that the claimant's average weekly wage should instead be calculated in the manner advocated by the claimant. The reasons for this determination are as follows.

First, there is no support in the case law or in logic for the employer's suggestion that the alleged post-injury decline in work opportunities for gatehouse dispatchers justifies basing the claimant's average weekly wage on an average of his earning during the five years preceding his work injury. Indeed, the defendants' suggestion that the claimant's average weekly wage should be reduced because of a post-injury decline in work opportunities for gatehouse dispatchers is directly contrary with the Benefits Review Board's recent holding in *Proffitt v. Service Employers International, Inc.*, BRB No. 06-0306 (2006), that "post-injury events, such as decreased work opportunities or wages, generally are irrelevant to the calculation of a claimant's average weekly wage." Slip opinion at 8. Moreover, even if it were permissible to consider post-injury work opportunities in calculating an average weekly wage, there has been no showing that there is any logical connection between the decline in work opportunities for gatehouse dispatchers and the claimant's wages in the five years prior to his work injury.

Second, it is well settled that average weekly wage calculations under the provisions of subsection 10(c) should not include periods that a claimant was unable to work due to an illness or injury. See *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 219 (1991); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182, 186 (1984) (claimant lost time from work due to an automobile accident); *Richardson v. Safeway Stores*, 14 BRBS 855, 860 (1982) (claimant missed work due to a gall bladder operation).

5. Date of Maximum Medical Improvement

A disability is considered to be permanent on the date a claimant's condition reaches the point of maximum medical improvement or if the condition has continued for a lengthy period of time and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781-82 (1st Cir. 1979); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984); *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988). The issue of whether a claimant's condition has reached the point of maximum medical improvement is primarily a question of fact and must be resolved on the basis of medical rather than economic evidence. *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not yet reached the point of maximum medical improvement. *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200 (1987). However, a condition is not permanent as long as a worker is undergoing treatment that is reasonably calculated to improve the worker's condition even if the treatment may ultimately be unsuccessful. *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27

BRBS 192, 200 (1993), *aff'd sub. nom Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994).

When considering medical issues in the Ninth Circuit, a treating physician's opinion is entitled to be given "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998). In addition, clear and convincing reasons must be given for rejecting an *uncontroverted* opinion of a treating physician. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). However, the Ninth Circuit has also held that a treating physician's opinion is not necessarily conclusive and may in some circumstances be disregarded, even if uncontradicted. For example, an administrative law judge may reject a treating physician's opinion that is "brief and conclusionary in form with little in the way of clinical findings to support [its] conclusion." *Id.* In addition, an administrative law judge can reject the opinion of a treating physician which conflicts with the opinion of an examining physician if the administrative law judge's decision sets forth "specific, legitimate reasons for doing so that are based on substantial evidence in the record." *Id.*

In this case, the claimant contends that his condition did not become permanent and stationary until July 12, 2005, which is the date of maximum medical improvement identified by Dr. Wickler. CX 3 at 5. In contrast, the employer contends that the date of maximum medical improvement is no later than May 24, 2002, based on Dr. Woodward's testimony that the claimant's only injury was an AC joint sprain that would have been expected to fully resolve within three months. Tr. at 39.

It has been concluded that the appropriate date of maximum medical improvement is July 12, 2005, as determined by Dr. Wickler. There are two reasons for this conclusion.

First, Dr. Woodward's opinion that the claimant's condition reached maximum medical improvement in May of 2002 is based on his assertion that the claimant's work injury did not require any kind of surgical treatment. As previously determined, that opinion is incorrect and the claimant actually needed surgery on both his neck and his shoulder.

Second, as the physician who had been treating the claimant since 2001, Dr. Wickler had a much greater knowledge of the claimant's medical condition than Dr. Woodward, who examined the claimant on only one occasion. It is also noted that unlike Dr. Woodward's opinion, Dr. Wickler's opinion is consistent with the opinions of the claimant's other medical care providers.

6. Extent of Entitlement to Disability Benefits

In cases involving disputes over an injured worker's entitlement to disability benefits, the burden is initially on the claimant to show that he or she cannot return to his or her regular employment due to a work-related injury. *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). If the claimant meets this burden, he or she is presumed to be totally disabled unless the employer is able to successfully demonstrate the existence of suitable alternative employment for the claimant in the geographical area where the claimant resides or was injured. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Hairston v. Todd Shipyards Corp.*,

849 F.2d 1194 (9th Cir. 1988). To satisfy its burden of showing the availability of suitable alternative employment, the employer must point to specific jobs that the claimant can perform. *Bumble Bee, supra*, at 1330. In deciding whether a particular job constitutes suitable alternative employment, a fact finder must consider the claimant's physical ability and skills, as well as the likelihood that a person of the claimant's age, education, and background would be hired if he or she diligently sought the possible job identified by the employer. *Hairston, supra*, at 1196; *Stevens v. Director, OWCP*, 909 F.2d 1256, 1258 (9th Cir. 1990). If an employer makes the requisite showing of suitable alternative employment, a claimant may rebut the employer's showing, and thus retain entitlement to total disability benefits, by demonstrating that he or she diligently tried to obtain such work, but was unsuccessful. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1376 n.2 (9th Cir. 1993); *Palombo v. Director, OWCP*, 937 F.2d 70 (2nd Cir. 1991). Under *Stevens, supra*, an injured worker that is unable to return to his or her old job is entitled to receive total disability benefits until the date that suitable alternative employment becomes available, even if maximum medical improvement occurs earlier. *Stevens*, 909 F.2d at 1258. Moreover, when determining the date of availability of suitable alternative employment, it is permissible to rely on vocational evidence that indicates that particular suitable jobs were available to a claimant prior to the time that a vocational witness conducted a job market survey. *Id.*

A. Extent of Entitlement to Temporary Disability Benefits

The parties agree that the defendants paid temporary total disability benefits to the claimant from March 11, 2002 until July 15, 2003 at the rate of \$933.82 per week and that the payment of temporary total disability benefits at the same rate was resumed from September 1, 2003 until May 17, 2005. The claimant contends that he should have also been paid total temporary disability benefits from July 16, 2003 to August 31, 2004 and from May 18 until July 12, 2005. In addition, the claimant contends that all payments should have been at the rate of \$966.08 per week, which is the maximum compensation rate in effect for injuries occurring between October 1, 2001 and September 30, 2002. In contrast, the defendants contend that no temporary total disability benefits were due after May 24, 2002 and that they are entitled to a credit for payments after that date. Alternatively, the defendants argue that the claimant should be bound by his stipulation that he was able to perform the physical requirements of his Dutch Harbor gatehouse dispatcher position as of March 10, 2004.

It has been concluded that the claimant was temporarily totally disabled during the entire period from March 11, 2002 until July 12, 2005, and was entitled to receive temporary total disability benefits during that entire period at a rate of \$966.08 per week. There are three reasons for this conclusion.

First, the contention that the claimant is not entitled to temporary total disability benefits after May 24, 2002 is based on the argument that the claimant reached the point of maximum medical improvement on that date and did not suffer any work-related injuries that required surgery. As previously explained, those arguments are unpersuasive.

Second, although the claimant did in fact informally stipulate that he was physically capable of returning to work as gatehouse dispatcher on March 10, 2004, such a stipulation is not

equivalent to a stipulation that such employment was available to him at that time. In fact, the evidence shows just the contrary: that the employer would not have been allowed to return to work as a gatehouse dispatcher on March 10, 2004 because he did not have a full, unconditional medical release on that date or on any subsequent date. Moreover, although the Ninth Circuit's decision in *Stevens* would have permitted the defendants to show that some other kind of employment was available to the claimant before the date his condition became permanent and stationary, the defendants have not presented any evidence that such alternative employment was in fact available to the claimant.

Third, although the defendants' post-trial brief acknowledges that the claimant contends that his temporary total disability benefits should have been paid at the rate of \$966.08 per week, the defendants have completely failed to dispute that contention. Indeed, it is clear that because the claimant's work injury occurred in February of 2002, he was entitled to benefits at the maximum rate for injuries occurring at that time: \$966.08 per week.

B. Extent of Entitlement to Permanent Disability Benefits

The claimant contends that his permanent impairments preclude him from returning to work as a gatehouse dispatcher. In addition, he further contends that he has a residual earning capacity of no more than \$473 per week. As proof of this contention, he has submitted into evidence testimony and a report from vocational expert Katherine Reid. Tr. 363-407, CX 8. According to Ms. Reid, her analysis of the claimant's transferable skills and educational background indicates that he has a residual earning capacity of \$11.82 an hour or \$473 a week in the Anchorage labor market. CX 8 at 276, Tr. at 372-73.

In contrast, the defendants decline to concede that the claimant cannot return to work as a gatehouse dispatcher. In addition, the defendants argue that even if the claimant cannot be re-employed as a gatehouse dispatcher, he could still obtain work performing other types of longshoring jobs in Dutch Harbor, such as gang boss, dock checker, walking boss, or union hall dispatcher, and thereby earn as much or more than he earned as a gatehouse dispatcher. Tr. at 339-42 (testimony of Ms. Jacobsen), EX 38 at 576 (December 31, 2005 letter from Mr. Lynch). Finally, the defendants assert that if the claimant were to remain in Anchorage, he would have the ability to earn \$15 to \$20 an hour (\$600 to \$800 per week). As proof of this contention, the defendants rely on reports prepared by their vocational expert, Carol Jacobsen. EX 39, Tr. at 316-17.

For the following reasons, it has been concluded that the claimant cannot return to work as a gatehouse dispatcher and that he has had a residual earning capacity of \$720 per week since October 10, 2005.

First, the fact that Mr. Lynch relied on the claimant's inability to provide a full medical release as grounds for refusing to re-hire him as a gatehouse dispatcher is by itself sufficient to establish that the claimant's work injury and residual impairments preclude him from returning to his former job.

Second, there is insufficient proof that the claimant would be eligible to seek other kinds of longshore jobs in Dutch Harbor and an absence of any reliable evidence indicating how much he could reasonably expect to earn, if he were in fact eligible to seek such jobs. In this regard, it is recognized that Mr. Lynch has speculated that the claimant might be able to find employment in Dutch Harbor as a gang boss, dock checker, or walking boss, and thereby work as many as 1400 to 1700 hours a year. However, Mr. Lynch's opinion on this subject does not appear to be well founded. As he admits in his letter of December 31, 2005, his belief that the claimant might be employed in other longshoring jobs is based entirely on a presumption that the claimant's union and other Dutch Harbor employers will agree to waive a general requirement precluding the employment of workers who have permanent work restrictions. EX 38 at 576. In view of the fact that Mr. Lynch himself refused to waive the full-release requirement when the claimant sought re-employment as a gatehouse dispatcher, it seems unreasonable to assume that other employers in Dutch Harbor would make a different decision. Moreover, there has been no showing that Mr. Lynch has the kind of expertise that would enable him to make credible estimates of the number of hours that the claimant might be able to work if the full-release requirement were waived. Although Mr. Lynch does manage one of the marine terminals in Dutch Harbor, there has been no showing that he has the kind of familiarity with union dispatching practices that would be needed in order to accurately predict how many hours of work might be available to a longshoreman who was limited to taking only certain kinds of longshore jobs. Indeed, other evidence credibly suggests that the claimant's opportunities for obtaining these alternative jobs would be limited.⁷

Third, although Ms. Reid has opined that her labor market survey indicates that the claimant is unlikely to be able to earn more than \$473 a week, the labor market survey conducted by Ms. Jacobsen was more extensive and was successful in identifying at least one job in the Anchorage area that is particularly suitable for the claimant. That job, which is listed on page 15 of Ms. Jacobsen's labor market survey, is for a shipping order/customer clerk at CSX/Horizon Lines' Anchorage office and pays at least \$720 per week. Although the job requires some lifting up to 35 pounds, Ms. Jacobsen noted that assistance in such lifting is available. It is therefore concluded that the job is compatible within the claimant's prior work experience and within the "light to medium" work restrictions recommended by Dr. Kralick and Dr. Wickler. Ms. Jacobsen's report indicates that such a shipping order/customer clerk job was last open 60 days prior to her report of December 8, 2005. Accordingly, it has been determined that this alternative employment was available to the claimant on October 10, 2005.

The difference between the claimant's average weekly wage of \$2,853.08 and his residual earning capacity of \$720 per week is \$2,133.08. Accordingly, beginning on October

⁷ According to the testimony of the claimant and Dan Kondak, a longshore worker who once worked as the hiring hall dispatcher in Dutch Harbor, dock checker jobs are assigned by rotation and "A card" union members like the claimant can obtain dock checker jobs only two or three times a week during the busy season and not at all during the slow season. Tr. at 146-49 (claimant's testimony), Tr. at 232-33 (testimony of Dan Kondak), Tr. at 374-77, 387-88 (testimony of Ms. Reid). In addition, there is evidence that the claimant's physical limitations would preclude him from performing all the duties of a gang boss or walking boss. Tr. at 143 (claimant's testimony), Tr. at 233-34 (testimony of Dan Kondak). Likewise, both the claimant and Mr. Kondak also testified that the union dispatcher job suggested by Mr. Lynch is an elective position and that it is questionable whether he could win an election for that job. Tr. at 149-51 (claimant's testimony), Tr. at 234-35 (testimony of Dan Kondak).

10, 2005 he became entitled to permanent partial disability benefits at a rate of \$966.08----the maximum rate for injuries occurring between October 1, 2001 and September 30, 2002.

ORDER

1. The defendants shall pay the claimant temporary total disability benefits for the period from March 11, 2002 to July 11, 2005, inclusive, at a compensation rate of \$966.08 per week.

2. The defendants shall pay the claimant permanent total disability benefits for the period from July 12, 2005 to October 9, 2005, inclusive, at a compensation rate of \$966.08 per week, plus any increases required under section 6 of the Longshore Act.

3. Beginning on October 10, 2005 and until ordered otherwise, the defendants shall pay the claimant permanent partial disability benefits at a compensation rate of \$966.08 per week.

4. The defendants shall receive credit for any compensation benefits paid to the claimant since March 11, 2002.

5. The defendants shall pay interest on each unpaid installment of compensation from the date the compensation became due at rates to be determined by the District Director.

6. The District Director shall make all calculations necessary to carry out this order.

7. The defendants shall provide all reasonable and necessary medical care for the treatment of the claimant's cervical and right shoulder injuries sustained on February 24, 2002, including all costs related to the cervical surgery performed by Dr. Kralick on January 30, 2004.

8. Within 20 days after this Decision and Order becomes final, the counsel for the claimant shall submit a fully supported and updated application for costs and fees to the undersigned Administrative Law Judge and to the counsel for the defendants. Within 10 days thereafter, the counsel for the defendants shall provide the claimant's counsel with a written list specifically describing each and every objection to the proposed fees and costs. Within 10 days after receipt of such objections, the claimant's counsel shall verbally discuss each of the objections with the counsel for the defendants. If the two counsel thereupon agree on an appropriate award of fees and costs they shall file written notification within 10 days and shall also provide a statement of the agreed-upon fees and costs. Alternatively, if the counsel disagree on any of the proposed fees and costs, the claimant's counsel shall within 10 days file a fully documented petition listing those fees and costs which are in dispute and set forth a statement of his position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by the counsel for the defendants. The counsel for

the defendants shall have 10 days from the date of service of such application in which to respond. No reply to that reply will be permitted unless specifically authorized in advance by this Administrative Law Judge.

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Paul A. Mapes
Administrative Law Judge

San Francisco, California